

1 IN THE CIRCUIT COURT OF THE STATE OF OREGON
2 FOR THE COUNTY OF MULTNOMAH

3
4 THE ESTATE OF MICHELLE)
 SCHWARZ, deceased, by and)
5 through her Personal)
 Representative, RICHARD)
6 SCHWARZ,)
)
7 Plaintiff,)
 vs.) Circuit Court
8) Case No. 0002-01376
 PHILIP MORRIS INCORPORATED,)
9 a foreign corporation, and)
 ROTHS I.G.A. FOODLINER,)
10 INCORPORATED, an Oregon)
 CORPORATION,)
11)
12 Defendants.)

13
14 TRANSCRIPT OF PROCEEDINGS
15 Volume 39-C

16
17 BE IT REMEMBERED, That the above-entitled
18 matter came on regularly for Jury Trial and was heard
19 before the Honorable Roosevelt Robinson, Judge of the
20 Circuit Court of the County of Multnomah, State of
21 Oregon, commencing at 3:30 p.m., Wednesday, March 6,
22 2002.
23
24
25

1 APPEARANCES:

2

3 Mr. D. Lawrence Wobbrock, Attorney at Law

Mr. Charles S. Tauman, Attorney at Law

4 Mr. Richard A. Lane, Attorney at Law,

Appearing on behalf of the Plaintiff;

5

Mr. James L. Dumas, Attorney at Law,

6 Mr. John W. Phillips, Attorney at Law,

Appearing on behalf of the Defendant

7 Philip Morris, Incorporated and Defendant

Roths I.G.A. Foodliner, Incorporated;

8

9 ALSO PRESENT:

10 Mr. Herbert Pallant

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WITNESS INDEX

FOR THE DEFENDANT:	Direct	Cross	ReD	ReX
Richard Carchman	5			
Ron G. Garrelts	40			
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I N D E X O F E X H I B I T S

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1 MARCH 6, 2002; 3:30 P.M.
2 (Jury in.)
3 THE COURT: All right. Thank you.
4 Counsel, let us try to proceed again.

5
6 DR. RICHARD CARCHMAN,
7 was thereupon called as a witness on
8 behalf of the Defendant and, having been first duly
9 sworn, was examined and testified as follows:

10 DIRECT EXAMINATION

11 BY MR. PHILLIPS:

12 Q Dr. Carchman, the jury has seen this
13 exhibit before, which is sort of a simple modern,
14 conventional cigarette design. Will you except
15 that?

16 A Yes.

17 Q And you talked about the recommendations
18 of the Tobacco Working Group, which did the
19 ventilation holes, reconstituted tobacco, paper wrap
20 and expanded tobacco. Those were in the Merit
21 cigarette, correct?

22 A Yes.

23 Q While you were working at Philip Morris,
24 did you and your colleagues use any of these designs
25 to facilitate smokers compensating within the

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1 cigarette?

2 A No.

3 Q And did you or any of your colleagues that
4 you are aware of have any intention to make it
5 easier for smokers to compensate within the
6 cigarette through your designs?

7 A No, quite the opposite.

8 Q What do you mean by that?

9 A One of the things that --

10 Q I'll put that back up, if you like.

11 A Thank you. Well, two things. One was to
12 try to push the ventilation holes away from the
13 mouthpiece to minimize people putting their lips on
14 them. And we kept moving it further and further
15 away. So that's one example.

16 The second is something that's not on
17 there, and that's called, abbreviated, the RTD or
18 resistance to draw.

19 Q Resistance to draw?

20 A Resistance to draw. And that is when you
21 smoke a cigarette, you draw on the cigarette. And
22 the cigarette is designed to have a certain draw.
23 It's like a small straw or a big straw. And there
24 is a policy, a Philip Morris policy, that when you
25 are designing cigarettes of lower tar, you try to

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1 keep the RTD as comparable to the higher-tar
2 cigarettes as possible. Because if you want to
3 design a cigarette that's easy to compensate, you
4 lower the RTD and therefore make it easier for the
5 smoker to (indicating). Because when you smoke, you
6 get used to the characteristics of the cigarette.
7 And when you change some of those characteristics,
8 it has an enormous impact on how the smoker uses the
9 product. And so one of the things, in addition to
10 all of this, was we tried to keep the difference in
11 the RTD as small as possible.

12 As I said, if you want to make a
13 compensatable cigarette, the RTD might be a hundred
14 for a Benson, a Benson & Hedges. If you wanted to
15 take a Merit, you would make the RTD 50. If you
16 wanted to make it compensatable, you would get a tar
17 yield for the person -- not for the machine, for the
18 person -- of much higher than what the machine would
19 be. So we tried very hard to keep the difference in
20 this resistance to draw very close between the
21 high-tar and the lower -- lower-tar cigarettes. So
22 we tried as much as possible to minimize the ability
23 to allow the smoker to do these kinds of things.

24 And the only other piece was the RTD.

25 Q Again, the RTD is the resistance to draw?

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1 A Yes.

2 Q So the desire, if I understand you, was
3 that the experience of smoking a Benson & Hedges, in
4 terms of how hard it takes to draw smoke in, would
5 be essentially the same as in a Merit so that you
6 wouldn't have a different smoking experience?

7 A You would try to minimize the difference
8 to therefore minimize what would then be the natural
9 ability to be able to draw more smoke through the
10 cigarette.

11 Q Okay. The jury has heard a fair amount
12 about compensation. Let me ask you this: Have you
13 studied the question of smoker compensation when
14 switching from a high-tar to low-tar cigarette?

15 A Yes.

16 Q And have you become familiar with the
17 government's understanding through the Surgeon
18 General?

19 A Yes.

20 Q How long has the scientific community
21 understood and been concerned about compensation, if
22 you know?

23 A Forty some-odd years.

24 Q Did the 1981 surgeon -- excuse me, Mr.
25 Phillips.

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1 Did the 1981 Surgeon General's report
2 address the issue of compensation?

3 A Yes.

4 Q So the Surgeon General discussed
5 compensation in the 1981 report?

6 A Yes.

7 Q Okay. I would like to show you page --
8 this is little Roman numeral VI in the preface of
9 the 1981 Surgeon General's report. Again, this
10 document, this exhibit is defense Exhibit 1004. And
11 I would like to go to paragraph 5, if you would, of
12 the -- of the basic findings of the report that are
13 being summarized.

14 It says, "Smokers may increase the
15 number of cigarettes they smoke and inhale more
16 deeply when they switch to lower yield cigarettes."

17 Excuse me, ladies and gentlemen.
18 "Compensatory behavior may negate any advantage of
19 the lower-yield product or even increase the health
20 risk." Do you see that?

21 A Yes, sir.

22 Q Do you have an understanding. Again, it
23 appears the Surgeon General is talking about both
24 sides of the column, both kinds of compensation?

25 A Yes.

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1 Q Okay. And is the Surgeon General making
2 the observation in this Surgeon General report in
3 1981 that compensation could potentially eliminate
4 the benefits of lower-yield products?

5 A Yes.

6 Q Let me turn to page 7 of the same report
7 and ask you to draw your attention to the paragraph
8 that begins "First" in the middle of the page. This
9 again is in the introduction overview of the Surgeon
10 General's Report and Conclusions. And it says,
11 "First, changing the tar yield should not change the
12 pattern or style of cigarette use. If the smoker
13 compensates for reduced yield by increasing the
14 number of cigarettes, the depth of inhalation" --
15 let me stop there. Let me carry on, actually -- "or
16 the volume or frequency of puffs" -- is that again
17 talking about both sides of those columns relating
18 to compensation?

19 A Yes.

20 Q "A reduction in tar might not result in
21 reduced smoke exposure. The possible increase in
22 the average number of cigarettes smoked by each
23 smoker and the possibility that the depth of
24 inhalation and puff volume may also have increased
25 as the average tar yield of the cigarette has

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1 declined raise a real concern that the shift to the
2 use of lower tar cigarettes may not have resulted in
3 a proportionate drop in smoke exposure."

4 He's talking about the risk that
5 compensation can reduce the benefits of low tar?

6 A Yes.

7 Q And this line, again, "proportionate drop
8 in smoke exposure," is that the same point you were
9 making earlier regarding a 16-milligram and
10 eight-milligram cigarette that the benefit may not
11 be a fifty percent reduction if you compensate?

12 A Exactly.

13 Q And again, your opinion regarding the
14 range of conclusions from epidemiology studies over
15 the last 40 years has been -- has shown a risk
16 reduction of ten to fifty percent?

17 A Yes, sir.

18 Q Okay. Let's go to page 8, if we can, or
19 is this page 8?

20 A It says page 8.

21 Q I'll go to the next. Excuse me. Page 18,
22 same report. And again in the conclusions regarding
23 cancer, paragraph number 2 -- if we can blow it up
24 so everyone can read it -- it indicates smokers of
25 lower tar and nicotine cigarettes may tend to smoke

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1 larger numbers of cigarettes, to inhale more deeply,
2 to have relatively higher amounts of
3 carboxyhemoglobin than predicted from machine
4 measurements" -- machine measurements would be the
5 FTC method?

6 A Yes.

7 Q "Of carbon monoxide yield and to have
8 higher than predicted carbon monoxide in exhaled
9 air." Do you see that?

10 A Yes.

11 Q Again, for the jury's sake, what is the
12 Surgeon General talking about in 1981?

13 A Using one tobacco smoke constituent, one
14 thing that is in the smoke of tobacco is carbon
15 monoxide. And the way people were measuring
16 exposure or uptake of cigarette smoke was to do two
17 things -- one of two things or maybe both things.
18 To measure carboxyhemoglobin. In your red blood
19 cells you have hemoglobin. When you inhale
20 cigarette, the carbon monoxide binds to that
21 hemoglobin much tighter than oxygen. It's
22 relatively simple to take a blood sample and measure
23 carboxyhemoglobin.

24 In a smoker, carboxyhemoglobin levels
25 can range from four percent to ten or twelve

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1 percent. In a non-smoker, it's just less than one
2 percent. So you have a big, dynamic range. You
3 could have from one percent to twelve percent.

4 The other measurement is you could
5 actually measure when you exhale the carbon monoxide
6 that comes out. And the people use both of these.

7 And what they are saying is if you
8 have a machine and you measure the carbon monoxide
9 coming out and then you measure the
10 carboxyhemoglobin or the exhaled carbon monoxide,
11 they are saying the machine numbers don't
12 necessary -- are not proportional, proportionate to
13 what you get for exposure.

14 Q Again, I won't belabor the point. Here is
15 page 180 of the Surgeon General's report. If we can
16 pull on the heading, its entitled "Compensatory
17 Behavior in Smoking." Are you familiar with this
18 section of the report?

19 A Yes, sir.

20 Q Again, we don't need to read all of this,
21 but could you begin, just describe for the jury your
22 understanding of what the Surgeon General was
23 discussing in 1981 regarding compensatory behavior
24 in smoking?

25 A Basically, he's re-expressing a very

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1 important concern that though the move has been to
2 lower tar and there is an epidemiological
3 relationship between smoking lower tar compared to
4 higher tar with a decrease in risk, you could get
5 rid of that decrease in risk by modifying how you
6 smoke -- how you smoke the product. Over and over
7 again it expresses this concern.

8 Q Now, the Surgeon General's report is, of
9 course, more of a scientific document that may be
10 read by some, but not many. Have you studied and
11 analyzed the statements by the public health
12 community to consumers, consumers like Michelle
13 Schwarz, regarding low-tar cigarettes during the
14 same time period?

15 A Yes.

16 Q And generally speaking, what is your
17 understanding of the public health message to
18 consumers at that time?

19 A Pretty consistent with what they have said
20 in something like the Surgeon General's report.

21 Q And could you describe it?

22 A Uhm, if you are going -- if you are going
23 to smoke and not quit, then you should smoke
24 lower-tar cigarettes. That is my very simplified
25 analysis of the messages.

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1 Q Okay. I want to show you an exhibit
2 that's already in evidence. I'm afraid I'm not
3 finding the exhibit number, but I'll have it here in
4 a second. I have shown this to counsel already.

5 This is the American Cancer Society
6 Bulletin in 1967. You are familiar with it?

7 A Oh, yes.

8 Q Okay. And it's pretty hard to see. The
9 document is in evidence. Forgive me, ladies and
10 gentlemen, I really should have that exhibit number
11 for you. Well, I will have that for you.

12 In any event, the chart has a series
13 of brands on it with certain numbers?

14 A Yes.

15 Q Can you explain what that means?

16 A What they have done here is listed a
17 variety of commercial brands with their tar and
18 nicotine yields based on the machine. They Have
19 ranked them. Basically, the key point is the very
20 bottom, the less tar and nicotine you inhale, the
21 better.

22 Q And were these rankings based on the FTC
23 method?

24 A Yes.

25 Q This is, by the way, Exhibit 766. I

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1 apologize for not having that number immediately.
2 766.

3 And this document is also a document
4 that the jury has seen. I'll ask you whether you
5 recognize it. Tape played: "We begin a few moments
6 of silence for people who are still smoking. If you
7 are still smoking, this is the next thing to think
8 about. Just how bad is your cigarette? It matter
9 quite a lot. You see bad as they all are, some are
10 worse. There are 118 different kinds and brands of
11 cigarettes: Short ones, long ones, longer than
12 longs; cotton filters, air filters, activated
13 charcoal filters and some with no filters at all.
14 You can buy yourself all kinds of trouble. Up to 31
15 milligrams of tar, up to two .2 milligrams of
16 nicotine. The least you can do -- and goodness
17 knows it isn't much -- is get a low-tar and nicotine
18 cigarette and cut down. Get a tar and nicotine
19 list. Send for it. It is free. Get to know your
20 nicotine before you strike a match."

21 That reference to "the least you can
22 do is go to a low-tar and nicotine cigarette if you
23 don't quit," is that the message you understood to
24 be conveyed to the health community at that time?

25 A Yes, that was the U.S. Government.

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1 Q Let me show you another exhibit. Excuse
2 me. This is another Federal Government poster. If
3 we can blow that up a little bit so we can actually
4 see the language, Mr. Walsh? Excuse me.

5 It says, "The cigarette world is
6 divided into the bad and the worse. You can buy as
7 much as 34 milligrams of tar in a cigarette or as
8 little as 2. As much as 2 .1 milligrams of nicotine
9 or as little as zero .2 There is a tar and nicotine
10 list below that tells you which is which. Look them
11 up. If you must smoke, at least bad is better than
12 worse." Same message?

13 A Yes.

14 Q If we can swing down to the lower portion
15 of the chart, and that's pretty hard to see, but
16 that's a chart again of the brands with their FTC
17 numbers?

18 A Yes.

19 Q If we can go back up again to the top for
20 a second? And if we can just show the language
21 there?

22 MR. TAUMAN: What's the number of that
23 exhibit, Mr. Phillips?

24 MR. PHILLIPS: I showed it to you earlier.
25 I'm having trouble with my numbers. I'll give

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1 it to you in a minute.
2 MR. TAUMAN: I have a current concern
3 about it.
4 MR. PHILLIPS: Do you want to raise it?
5 MR. TAUMAN: Well, I would like to at
6 least look.
7 MR. PHILLIPS: I'll be happy to give
8 you -- did I give it back to you or did you
9 keep it? Forgive me. I'll have to dig it out.
10 MR. DUMAS: I don't know that we have a
11 number for it.
12 MR. PHILLIPS: Here it is.
13 MR. TAUMAN: Go ahead.
14 BY MR. PHILLIPS:
15 Q This document refers to 34 milligrams of
16 tar. Is that again a reference to the FTC tar
17 measurement?
18 A Yes.
19 Q And as little as 2, that's a reference to
20 the FTC tar measurement?
21 A Yes.
22 Q Does this poster tell consumers that if
23 they switch down, they are going to be getting less
24 tar based on these numbers?
25 A Yes.

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1 Q Do these numbers suggest an implied
2 reduction in risk?

3 A Yes.

4 Q Let's turn to the Surgeon General's report
5 of 1981. And let me -- excuse me for a second.

6 Page 52. Excuse me.

7 MR. DUMAS: Excuse me, Your Honor

8 (Discussion between counsel off the record.)

9 MR. DUMAS: Excuse me, Your Honor, may I
10 step out for a moment, Your Honor?

11 THE COURT: Certainly.

12 MR. PHILLIPS: I'm sorry. I took the
13 wrong page. This is page 54 of the Surgeon
14 General's report from 1954. If we can go to
15 the bottom of the page. And it discusses the
16 effect of smoking machine parameters on
17 relative or absolute yields of smoke components
18 from various types of cigarettes. Is that also
19 a subject that was addressed in that Surgeon
20 General's report in 1981?

21 A Yes.

22 Q And it indicates in the paragraph "Smoke
23 Machine Assays -- is that the measurements under the
24 FTC method?

25 A Yes.

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1 Q "Of cigarettes fulfill two needs: The FTC
2 ratings of tar and nicotine yields measure an
3 implied risk to the smoker."

4 Let's just stop right there. What is
5 meant by "measure an implied risk to the smoker"?

6 A The higher the tar number, the greater the
7 risk.

8 Q And is that implied risk based on the
9 epidemiological studies that you just described?

10 A Yes.

11 Q And then it goes on to say that smoking
12 machine data guide experimenters elucidating the
13 mechanisms of reduction of smoking-related disease,
14 which is a separate issue.

15 Uhm, with respect to the question of
16 compensation, which is addressed in the Surgeon
17 General's report, did -- are you aware of any time
18 when the public health community during Michelle
19 Schwarz's lifetime concluded that because of
20 compensation, the lower risk associated with the
21 epidemiological studies should be ignored and its
22 lower-tar cigarettes are not safer?

23 A No.

24 Q Did you say no?

25 A I said no.

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1 Q And from your own perspective as a
2 scientist in this area, do you believe the existence
3 of compensation as described in the 1981 Surgeon
4 General's report is reason to abandon the
5 conclusions relating to the epidemiology?

6 A They didn't, and I don't.

7 Q Okay. Why not? Why not if smokers are
8 potentially compensating to smoke as much nicotine
9 or tar as they had with the higher-tar cigarette,
10 why doesn't that eliminate the benefit?

11 A The -- if I can use the --

12 Q The chart?

13 A -- the chart?

14 Q Certainly. If that's all right, Your
15 Honor. You want to use this chart?

16 A Yeah.

17 Q I'm sorry. Go ahead.

18 A The right side of this is naturally
19 embedded in the design of the epidemiology studies.
20 It is just there as they do the studies.

21 The left side, the number of
22 cigarettes per day, is not. And you either have the
23 question you ask the person or the surrogate of the
24 person, how many cigarettes per day have you smoked
25 and for how long? That is an adjustment that you

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1 can make or don't have to make, but it's not
2 embedded naturally in the design of the study. The
3 right side is.

4 So when you do a study and you
5 compare the groups and now you are comparing not
6 just people who smoke and don't smoke, but you are
7 comparing people who smoke different kinds of
8 cigarettes, how they smoke the cigarette is just
9 naturally there. And so when you see a reduced risk
10 in lung cancer between high tar and low tar, that's
11 in the design of the experiment.

12 Whereas, the left side, how many they
13 smoked, that's a separate, independent variable that
14 you can or don't have to adjust for.

15 Q Let me see if I can make this more
16 understandable to me, because I've struggled with
17 this question.

18 When you do a study of two -- of a
19 population of smokers, all right? And some of those
20 smokers are high-tar smokers and some of them are
21 low-tar smokers, and you are trying to measure the
22 risk, the relative risk between those two
23 populations?

24 A Yeah.

25 Q Does that measurement take into account

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1 how each of those smokers, whether they are high-tar
2 smokers or low-tar smokers actually smoke their
3 cigarette?

4 A That's what I was trying to say, yes.

5 Q So just to be clear, if every low tar
6 smoker is cutting off the filters and smoking it
7 without the filter, whatever impact that does to
8 risk reduction is measured in the epidemiological
9 study?

10 A Yes. Another way of saying it is if
11 people compensated to a hundred-percent degree, you
12 would not see a risk reduction at all comparing the
13 two.

14 Q And that's true with each of these? If a
15 smoker is smoking to a shorter butt when they switch
16 from a high-tar to a low-tar cigarette, that is
17 measured by the epidemiological studies?

18 A In a sense -- in a sense, yes. Let me
19 just say some of these things have bigger impacts
20 than others. So when you smoke the cigarette down
21 to the very end, that is probably one of the worst
22 things you can do. Blocking the vent holes is going
23 to have an impact, but it's really impossible,
24 unless you tape the cigarette, to block all the vent
25 holes.

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1 Puffing more intensely is going to be
2 a contribution. Different people are potentially
3 going to do different things differently. They are
4 going to have slightly different impacts in terms of
5 what they are taking in; therefore, the risk. But
6 all of that gets factored in. Nobody knows, nobody
7 has done the study to break down these nine things.
8 It's sort of all aggregated in when you do a study
9 of thousands and thousands of people.

10 Q Let me ask it this way: Are you saying if
11 smokers did all of these things -- you have
12 mentioned they are all different and they do
13 different things. If smokers that went to low-tar
14 cigarettes, did all of these things, the studies
15 that you have discussed this morning with the jury
16 that measure the risk between low tar and high tar
17 measure the effect of that?

18 A Yes. And if I might, if somebody did all
19 those things, I -- my expectation would be that the
20 risk would go up, because the yield from those
21 cigarettes would be greater than the cigarette they
22 switched down from.

23 Q Now, let's turn to studies of compensation
24 at Philip Morris. Are you familiar with the studies
25 of compensation that Philip Morris did within the

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1 company?

2 A Yes.

3 Q And can you tell us why Philip Morris was
4 examining the question of compensation?

5 A Well, it is the responsibility of the
6 company when people have raised a variety of issues
7 about designs and how people smoke to investigate
8 those, to try to minimize those as a problem. And
9 so that was, I would say, the leading reason why
10 Philip Morris -- not just compensation, about with
11 almost any kind of assessment, whether it's
12 compensation or a smoke constituent, we investigated
13 all of them. And so compensation was just an
14 example of what the company felt was its
15 responsibility to investigate.

16 Q Okay. And have you come to an opinion
17 regarding the conclusions that those studies that
18 the company did regarding compensation, what they
19 came to?

20 A Yes.

21 Q And what is your opinion?

22 A The total body of evidence, based on
23 internal work, was that you could demonstrate
24 everything from complete compensation to no
25 compensation to -- you couldn't determine whether

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1 there was compensation or not. And this is looking
2 at the total body. There were studies that showed
3 one. There were other studies looking at a similar
4 population that showed something else. So depending
5 on the study, you could draw any number of -- any
6 number of conclusions. And there are at least two
7 or three explanations as to why.

8 Q All right. Let me ask you to draw your
9 attention to a 1982 study, which is already in
10 evidence. Is this a Philip Morris Company study
11 regarding compensation?

12 A Yes.

13 Q All right. And do you know the
14 individuals who were involved, Mr. Dunn and is it
15 Ms. Jones?

16 A Actually it's Dr. Jones and Dr. Dunn. And
17 Dr. Jones is now Dr. Angel. She got married,
18 recently.

19 Q And what did Dr. Jones do for the company?

20 A Dr. Jones is a Ph.D. psychologist. And
21 she was involved at this time in what I guess would
22 be characterized as smoking behavior, smoking
23 behavior studies.

24 Q Okay. And this study on page 10, we can
25 look at the paragraph in the middle of the page. It

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1 talks about published research. It says, "Published
2 research examining the nicotine titration
3 hypothesis" -- We should stop on that phrase. I
4 think the jury has heard that phrase before. But am
5 I correct in understanding the nicotine titration
6 hypothesis to be the hypotheses that smokers
7 completely compensate for nicotine when they switch
8 down to a low-tar cigarette?

9 A Two points, if I might.

10 Q Sure.

11 A One, this is an annual report. So this is
12 a summary of everything that went on in this project
13 over a year.

14 Q Okay.

15 A This normally in the world of Philip
16 Morris, they provide an introduction in terms of
17 what has gone on outside the company. That's what
18 you are talking about here.

19 The nicotine titration hypotheses
20 basically says people will smoke to their level of
21 nicotine. They will smoke that cigarette until they
22 get whatever their set point for nicotine is. They
23 will titrate how they smoke a cigarette to get that.

24 Q Okay. Are the studies that are referred
25 to in this paragraph, sir, Russell, Ashton and

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1 Russell again, are those published studies in the
2 scientific literature?

3 A At that time, yes.

4 Q Are those studies that postulated the
5 hypotheses of nicotine titration?

6 A Yes.

7 Q And were those kinds of studies also
8 available to the Surgeon General in 1981 when the
9 Surgeon General wrote the Surgeon General's report
10 in 1981?

11 A Absolutely.

12 Q And I want to turn to page 180 of the
13 Surgeon General's report. And drawing your
14 attention to the last paragraph, this is again under
15 an entire section called Compensatory Behavior in
16 Smoking. And it refers to a -- a Russell in the
17 middle of the page. "By smoking more to compensate
18 for lower nicotine intake, lower tar and nicotine
19 cigarette smokers can inadvertently increase their
20 exposure to tar, et cetera." And then it goes on to
21 talk about "Because less" -- I'm in the middle of
22 the page. "Because less hazardous cigarettes may
23 require the delivery of moderate levels of nicotine
24 while delivering lower levels of tar and carbon
25 monoxide, Russell has proposed that lower

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1 tar-to-nicotine ratios should be used to indicate
2 less hazardous cigarettes." Is that the same
3 Russell who is referred to in the 1982 report,
4 annual report, of Philip Morris?

5 A Yes, M.A.H. Russell.

6 Q This is an English scientist?

7 A Yes.

8 Q Now, the jury may have heard this already,
9 but Dr. Russell was proposing that you actually add
10 nicotine to a cigarette so that there would be more
11 nicotine in the lower-tar cigarette?

12 A And then nicotine delivered in the smoke,
13 yes.

14 Q Are you aware of whether public health
15 authorities in the United States have ever
16 recommended that as the way Philip Morris or any
17 other tobacco company should go?

18 A Not in the United States, no.

19 Q Now, this particular study has a
20 discussion of results. And I would like to turn to
21 that. It's a study Philip Morris did in 1982.

22 It indicates, "Results show
23 inhalation patterns are modifiable and may be
24 altered, but not only the nicotine delivery -- by
25 not only the nicotine delivery, but by other factors

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1 as well."

2 And turning to the next page, "Data
3 found in the literature indicate that some, but not
4 all, smokers change puff parameters."

5 Let me just stop you there. Is
6 your -- it says "to compensate for reduced nicotine
7 delivery in a cigarette." Is your review of the
8 scientific literature to date consistent with that
9 statement?

10 A Yes.

11 Q What does it mean?

12 A Again, it is part of this right side of
13 your table, that by taking bigger puffs, by smoking
14 down the end of the cigarette, having shorter
15 intervals between puffs, those are the kinds of
16 parameters that they are referring to here.

17 Q Okay. And it goes on to say, "Our data on
18 inhalation patterns show similar results." Is that
19 a reference then to the published literature, the
20 Philip Morris data, similar to the published
21 literature?

22 A Yes.

23 Q "In this case, with three of the five
24 subjects demonstrating distinctive behavior changes
25 in the direction that would suggest titration,

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1 changes in patterns of the other two subjects
2 provide evidence that there is an additional factor
3 or factors influencing smoke inhalation behavior,
4 such as cigarette acceptability, impact, et cetera."

5 It goes on, and the jury will have a
6 chance to review that entire document in the jury
7 room. Do these statements here reflect your own --
8 are consistent with your own review of Philip Morris
9 compensation studies over the years?

10 A yes.

11 MR. TAUMAN: Excuse me, is that.
12 Plaintiff's Exhibit 225?

13 MR. PHILLIPS: It is.

14 Q And again, for the jury's benefit, what is
15 your opinion regarding what those studies show?

16 A That in this experiment, some of the
17 people -- some -- three out of five -- sixty percent
18 of the people demonstrated a change that would
19 support Dr. Russell's hypothesis. Forty percent
20 didn't.

21 When I'm using the words 60 and 40,
22 we're only dealing with a small number of people
23 here.

24 Q Okay. Let's look at another Philip Morris
25 study that involved more people, a summary of

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1 studies that involved more people. Are you familiar
2 with Exhibit 915, Dr. Ryan's September 16, 1976
3 memo?

4 A Yes.

5 Q And if we can again look at a summary.
6 Dr. Ryan said, "We have been examining the effects
7 of delivery change on number of cigarettes smoked
8 per day for several years in the hope that we could
9 support an intake quota hypotheses. Is that the
10 same thing as nicotine titration hypotheses?

11 A Actually, it's broader, but it would
12 include that.

13 Q Based on tar and/or nicotine. So that's
14 the broader portion of it?

15 A Yes.

16 Q In other words, he was examining whether
17 people would smoke to get more tar or more nicotine
18 when they switched down?

19 A And/or.

20 Q And/or. Okay. "If an intake quota could
21 be demonstrated, this fact would go a long way
22 toward answering the question why do people smoke, a
23 question we feel is our responsibility to answer."

24 Did you feel when you were at Philip
25 Morris that was a responsibility for Philip Morris

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1 to answer?

2 A Absolutely.

3 Q Again, for the jury's understanding, why
4 did you feel that was important to answer?

5 A When somebody makes a claim that impacts
6 whether the product you put out there may not be
7 what you think it is, you have a responsibility to
8 investigate it and find out if, indeed, that's true,
9 and if it is true, to try to modify the product to
10 eliminate that issue. So I think that was the
11 issue. That still is the issue in general, not just
12 limited to compensation. So this is the right thing
13 to do.

14 Q Excuse me, Dr. Carchman -- Your Honor,
15 with apologies to Dr. Carchman, the other witness
16 who is only here this afternoon has arrived. I know
17 we have treated Dr. Carchman like a yo-yo today. I
18 think I need to throw that yo-yo down again. If we
19 could have the witness come back probably tomorrow
20 morning?

21 THE COURT: Okay. Come back tomorrow
22 morning, and we'll take up the next witness.

23 MR. PHILLIPS: Thank you, Dr. Carchman. I
24 apologize for the interruption.

25 MR. WOBBROCK: Your Honor, maybe we could

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1 have a brief side bar?

2 THE COURT: All right. Come on up,
3 counsel.

4 (Discussion off the record at the bench.)

5 THE COURT: All right. Members of the
6 jury, why don't we take about a ten-minute
7 break. We may go to 5:15 today. Would that
8 create a problem for anyone if we went to 5:15?
9 Why don't we take a ten-minute break, and we'll
10 try to get back in and get going. Thank you.

11 (Jury out.)

12 MR. WOBBROCK: Your Honor, I have a matter
13 for the Court. This is a 49-page deposition.
14 I'm on page 12. There is no way I can prepare
15 for this man's deposition based on the way they
16 have set this thing up.

17 I, first of all, move that he not be
18 allowed to testify until I get a chance to
19 properly prepare.

20 THE COURT: All right. Counsel from the
21 other side, help me out.

22 MR. DUMAS: Your Honor, this was discussed
23 today. The arrangements were made. The Court
24 gave an extraordinary remedy under the
25 circumstances, which was appropriate, to allow

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1 plaintiff's counsel to depose this witness,
2 which they are normally not entitled to do, but
3 they were given that opportunity, which was
4 fair and appropriate. They did it. They took
5 the deposition. The Court gave them an hour.
6 They took an hour.

7 It's a very, very simple line of
8 testimony. This is not complicated stuff. And
9 the lawyer who took the deposition is sitting
10 here in the courtroom. And he is certainly
11 capable of doing whatever cross-examination is
12 necessary of this witness.

13 Like I said, Your Honor, this is very
14 simple. The man has to fly back home to go to
15 work tomorrow morning. I can't carry him over.

16 Now, if counsel wanted to be having lots
17 of time to read the deposition, then he
18 shouldn't have asked for the deposition today
19 at 1:30 knowing I was going to have to put this
20 man on at three o'clock. And now it is almost
21 4:30.

22 I'm estimating on direct exam, Your Honor,
23 I can probably get this man done in 15 minutes
24 of background questions, and then I'm going to
25 show a ten-minute video. Then I'm done.

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1 MR. WOBBROCK: Here's the problem, Judge.
2 They chose to set it up this way. There would
3 have been no need for a deposition if they
4 would have kept his name on the list like they
5 should have. For whatever reasons, they
6 decided to put him on, pull him back off,
7 thwart our investigation. Who knows why they
8 really did that. I have no idea.

9 But, in fact, they didn't follow the
10 rules. We did. So now we find a chance the
11 Court -- as counsel admits -- properly allows
12 us a deposition, but we can't use it because I
13 only have ten minutes to read a 49-page
14 deposition. So basically, we might as well not
15 have had a deposition.

16 The deposition did reveal this man does
17 not get on an airplane until 10:30 tomorrow.
18 They have got -- they can put him on, let me
19 read the deposition overnight, and I can
20 cross-examine him at 8:30 or 9:00 o'clock in
21 the court -- with the Court's permission. If
22 he has to get on -- I mean, they set this up.
23 That's their problem. If they hadn't set it up
24 this way, we wouldn't be in this pickle. The
25 circumstances are totally of their creation,

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1 not mine.

2 If I don't get a chance to cross-examine
3 him, then he shouldn't be allowed to testify.

4 MR. DUMAS: Your Honor --

5 MR. WOBBROCK: Just a minute. If he's
6 going to go put him on for 25, 30 minutes, I'm
7 going to have ten minutes to cross-examine him.
8 That's not proper.

9 If they have to get him a later plane or
10 they have to compensate him for his work
11 loss -- he's a retired teacher. So I don't
12 know what his work is. I'm sure we're going to
13 hear it. They are the ones that put him on the
14 list and yanked him off. We didn't do that to
15 them. We stuck to that list entirely. Exactly
16 what we told them we would.

17 We do have the right to propose percipient
18 fact witnesses in this case, not experts. But
19 this is a fact witness. So we would have had a
20 right to depose him. We could have done it
21 back there. We could have sent an investigator
22 to talk to him.

23 THE COURT: Mr. Dumas, is it possible for
24 him to take a later flight? He needs to be
25 back to teach Friday morning, I assume. Is

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1 that a possibility.

2 MR. DUMAS: I can ask him, Your Honor.

3 Let me first respond.

4 I do resent the implication of Larry's
5 statement that I set this up. Mr. Garrelts was
6 taken off the witness list at the first
7 opportunity that the defense counsel -- that I
8 believed in good faith we were not going to
9 call him because I couldn't get a hold of the
10 guy to talk to him myself. So rather than
11 string them along by keeping a name on the list
12 of some guy who I wasn't going to call, I took
13 the name off. And then out of the blue, he
14 reappeared and he became a witness again. So I
15 put him on. And Larry didn't follow the rules
16 all the way, Your Honor. What happened to
17 Jeffrey Bible, a deposition that was taken four
18 years ago? Mr. Wobbrock didn't put Mr. Bible's
19 name on any witness list. We heard about that
20 in the middle of the plaintiff's case.

21 So what's fair, you know, fair play here,
22 Your Honor? I'm doing the best I can.

23 MR. PHILLIPS: And Your Honor --

24 THE COURT: Very well. That's on the
25 record. The court reporter is taking it down.

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1 Let's bring the jury and get moving.

2 MR. WOBBROCK: So I'm going to be required
3 to cross-examine him, Your Honor?

4 THE COURT: No, no, no. We will question
5 him, find out from him can they get him a later
6 flight than 10:30, because he need to be back
7 to get to work Friday morning.

8 MR. WOBBROCK: The record ought to be
9 clear he's a substitute teacher. They probably
10 can get somebody else. He's retired, Your
11 Honor.

12 MR. DUMAS: Let me go inquire, Your Honor.

13 THE COURT: All right. Somebody need to
14 call United or somebody real quick. But right
15 now I want to get the jury in.

16 MR. PHILLIPS: Your Honor, I'll
17 represent -- I'll talk to these gentlemen.

18 (Jury in.)

19 MR. DUMAS: Your Honor, the defendant
20 calls Mr. Ron Garrelts to the stand.

21
22
23
24
25

1 RONALD GARRELTS,
2 was thereupon called as a witness on
3 behalf of the Defendant and, having been first duly
4 sworn, was examined and testified as follows:

5 DIRECT EXAMINATION

6

7 BY MR. DUMAS:

8 Q Mr. Garrelts, the ladies and gentlemen of
9 the jury are over there. They want to hear what you
10 have to say. And Mr. Wobbrock wants to hear what
11 you have to say, and so does the judge. So you need
12 to keep your voice up, okay?

13 A Yes.

14 Q All right. It's a small room kind of, but
15 for some reason everyone seems to be having kind of
16 a hard time hearing. So do the best you can.

17 What's your name, sir?

18 A Ronald G. Garrelts.

19 Q What do you do for a living?

20 A Retired from biology teaching.

21 Q And how long did you teach biology?

22 A Uhm, 37 years.

23 Q Okay. You must like teaching?

24 A Yes, I do.

25 Q I understand you still teach as a

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1 substitute teacher?
2 A Substitute, yes.
3 Q When did you retire from full-time
4 teaching?
5 A June, 1997.
6 Q And have you been doing substitute
7 teaching since then?
8 A Just recently.
9 Q Oh, just picked it up again?
10 A Yes.
11 Q Oh, what do you substitute teach, sir?
12 A Well, whatever they need me for: Physical
13 education, social studies, business law, whatever.
14 Q Okay. What grade level, sir?
15 A Uhm, ninth grade through 12th.
16 Q Ninth through 12th. That would be high
17 school then?
18 A High school.
19 Q Okay. Where do you live?
20 A [DELETED]
21 Q And how long have you lived in [DELETED]?
22 A All my life, 64 years.
23 Q Okay. So you are 64 years of age, sir?
24 A Yes.
25 Q Why don't you just in a thumbnail sketch

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1 summarize your education for the jury?

2 A I have gone to a lot of colleges.
3 Carthage College, two years, Carthage, Illinois;
4 Western Illinois University for my last two years to
5 get my bachelors; Illinois Wesleyan University at
6 Bloomington, Illinois for three summers through the
7 National Science Foundation, grant to get my Masters
8 Degree; Ohio State University, one year for National
9 Science Foundation Grant, nuclear physics and
10 radiation biology; Western Michigan University in
11 about 1968, human ecology through the National
12 Science Foundation; Northern Illinois University De
13 Kalb course in sociology; Governors State
14 University, Park Forest, Illinois, courses in
15 ecology. And I can't recall there is another one or
16 so. But anyway, I have a lot of semester hours
17 beyond the Master's.

18 Q That will probably do it. I am assuming
19 that you are a certified teacher in Illinois?

20 A Yes.

21 Q How long have you been a certified
22 teacher?

23 A Since 1960.

24 Q Okay. Now, you just came from giving a
25 deposition where you answered a bunch of questions

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1 from -- that lawyers posed to you?
2 A Yes.
3 Q Did you answer those to the best of your
4 ability?
5 A To the best of my ability.
6 Q You are going to answer my questions in
7 front of these folks to the best of your ability?
8 A The best of my ability.
9 Q When Mr. Wobbrock asks you questions, you
10 are going to answer his questions the best you can,
11 right?
12 A Yes.
13 Q All right. You came here to Portland.
14 You flew here what, last night?
15 A Yes.
16 Q All right. You and I met for the first
17 time today over the noon hour?
18 A Yes, we did.
19 Q Is that right?
20 A Yes.
21 Q Okay. Have you ever been to Portland
22 before?
23 A No.
24 Q You came here at the request of the
25 lawyers representing the defendant Philip Morris in

Garrelts - D

1 this case, right?
2 A Yes.
3 Q Do you have any past connection with
4 Philip Morris?
5 A No.
6 Q Any current connection with Philip Morris?
7 A No.
8 Q Mr. Garrelts, did you teach high school
9 biology at Lincoln Way Community High School Central
10 in New Lenox, Illinois, in the years 1962, 1963?
11 A Yes.
12 Q Why don't you tell us when you started
13 teaching biology at that high school, Lincoln Way?
14 A In 1962.
15 Q How long did you teach at that high
16 school?
17 A Until 1997.
18 Q So you were there from '62 to '97?
19 A Yes.
20 Q Now, I am going to show you what has been
21 marked as Defense Exhibit No. 700, handing a copy to
22 counsel, which is a transcript from Michelle Chuck
23 from Lincoln Way Community High School Central in
24 New Lenox, Illinois?
25 A Yes.

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1 Q Have you seen that before?

2 A Yes, today.

3 Q Okay. Now, that document, which we
4 obtained from Mr. Wobbrock's office, indicates that
5 Michelle Chuck graduated from Lincoln Way High
6 School in 1964, right?

7 A Yes.

8 Q Okay. And with regard to her high school
9 biology class, is that normally taught in the third
10 year at Lincoln Way?

11 A Ordinarily the sophomore year, but, yes,
12 it had been changed to the sophomore year of high
13 school, yes.

14 Q And that particular transcript --

15 A Can I answer that more correctly?

16 Q Oh, sure.

17 A It used to be offered at sophomore. In
18 modern times, it has moved to the freshman level.
19 But sophomore at that time.

20 Q Okay. In reviewing that transcript, sir,
21 does that show that Michelle Chuck took high school
22 biology in the third year?

23 A Yes.

24 Q Now, that would be her junior year, right?

25 A Yes.

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1 Q That would be the academic year 1962 to
2 '63?

3 A Yes.

4 Q And assuming Michelle Chuck took high
5 school biology at Lincoln Way High School in 1962
6 and 1963, who would have been her teacher?

7 A I and George Abraham team taught 50
8 students per class, and there were three classes.

9 Q Let me ask you this, Mr. Garrelts -- I
10 think I know the answer, but I'm going to ask you
11 anyway. I'm asking you about a student of yours,
12 what, almost 40 years ago, right?

13 A Yes.

14 Q You remember Michelle Chuck?

15 A Not individually.

16 Q Now, let me ask you this, Mr. Garrelts:
17 When you were teaching high school kids biology back
18 in Lincoln Way in 1962 and 1963, did you teach them
19 about the health risks of smoking?

20 A Yes.

21 Q Why did you do that?

22 A It was because in those days there was no
23 separate health department. And so the biology
24 course was responsible and within the textbooks was
25 chapters involved with health.

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1 MR. DUMAS: Your Honor, I would move into
2 admission Defendant's Exhibit number 700?

3 MR. WOBBROCK: No objection.

4 THE COURT: It will be accepted.

5

6 (Whereupon, Exhibit No. 700 was offered and
7 received.)

8

9 BY MR. DUMAS:

10 Q Mr. Garrelts, I'm going to hand you what
11 has been marked as Defendant's Exhibit No. 652. Do
12 you recognize that?

13 A Yes.

14 Q What is it?

15 A It's the textbook Modern Biology, a
16 Xeroxed copy of some of the chapter information from
17 the textbook and the authors.

18 Q It's not the entire book, obviously?

19 A No.

20 Q Handing a copy to counsel.

21 Did you use and have a copy of this
22 textbook in your classes when you taught high school
23 biology back in Illinois?

24 A It would have been used as a referral.

25 Q Okay. What does that mean, sir?

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- 1 A That means -- I came from a high school
2 where we had a specific text assigned to students.
3 That means when I went to the Lincoln Way High
4 School, they had a series of various textbooks, and
5 Modern Biology was one that was used as a referral
6 to give various background. Information that wasn't
7 covered in one text, they had an opportunity to look
8 in another text to find information.
- 9 Q Was this textbook kept in the classroom?
- 10 A Yes, it was.
- 11 Q In your classroom at Lincoln Way?
- 12 A Yes.
- 13 Q And did you use the textbook on occasion
14 for reference purposes in teaching your class?
- 15 A I used this my first two years of
16 teaching, and I would have used information from
17 this textbook in lecture preparation.
- 18 Q All right. Now, in addition -- and this
19 textbook contains information concerning the health
20 risks of smoking, right?
- 21 A Yes.
- 22 Q Now, in addition to the information in the
23 textbook, sir, did you also obtain and use materials
24 from the American Cancer Society in teaching high
25 school biology in the 1960, 1964 time range?

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1 A Yes.

2 Q Tell us about the American Cancer Society
3 and what materials you obtained and how you obtained
4 them and what you did with them?

5 A We -- the American Cancer Society of Will
6 County and Joliet, Illinois always provided us with
7 many pamphlets and things that were concerned with
8 the education of students. They also had films -- I
9 think 35-millimeter films -- which we rented from
10 them to use in our classroom as another method to
11 provide information for students. We used as many
12 as we could, lectures, video helps, pamphlets,
13 whatever we could use to prepare them for adulthood
14 and society.

15 Q Okay. When you say "prepare them for
16 adulthood," what do you mean?

17 A To know various applications of biology
18 for what definition of life is, what the effects of
19 various environmental things would do to them.

20 Q Does that include cigarette smoking?

21 A Yes.

22 Q Why did you use so much of the American
23 Cancer Society material in your teaching, sir?

24 A Because it was another additive to provide
25 another method of getting the information across.

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1 Q Why did you want to get the information
2 across to your students about the health risks of
3 smoking?

4 A Because in time, it's eventually going to
5 kill them through the effects of tars and nicotine
6 on the respiratory system.

7 Q You wanted your students to know that?

8 A Yes. Part of our re--

9 Q Go ahead.

10 A It was part of our responsibility as a
11 teacher to provide this information to our students.

12 Q Did you take that responsibility
13 seriously?

14 A Yes.

15 Q Did the American Cancer Society also
16 produce and provide for use by teachers like
17 yourself film strips?

18 A Yes.

19 Q And do you recall a film strip that you
20 used in your classes called "To Smoke or Not to
21 Smoke"?

22 A Yes, it was one of our materials.

23 Q And why did you use that, sir?

24 A Because it provided information about the
25 cause of death; also the effects to the lung and the

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1 respiratory system, the scilla, mucus and other
2 things within the lungs.

3 Q You used that when you were teaching high
4 school biology at Lincoln Way Community High School
5 in New Lenox, Illinois; is that right?

6 A Yes.

7 Q And at my request, sir, did you take a
8 look this morning at a videotape of "To Smoke or Not
9 to Smoke"?

10 A Yes, I did.

11 MR. DUMAS: I would offer 1502, Your
12 Honor, and play that at this time?

13

14 (Whereupon, Exhibit No. 1502 was offered.)

15

16 MR. TAUMAN: Your Honor, we have a matter
17 for the Court on this.

18 THE COURT: All right. We'll have the
19 jury step out to the jury room, please.

20 (Jury out.)

21 MR. WOBBROCK: Your Honor, I have a
22 question in aid of objection.

23 THE COURT: Okay. You may proceed.

24 MR. WOBBROCK: I might suggest, too, we
25 have spoken to counsel, and Mr. Garrelts is

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1 going to come back tomorrow. So you might want
2 to send the jury home. I'll leave that up to
3 the Court. Let me ask these questions in aid
4 of objection. Then we'll see where I am.

5 THE COURT: All right.

6 EXAMINATION IN AID OF OBJECTION

7 BY MR. WOBBROCK:

8 Q Mr. Garrelts, this videotape, have you
9 seen it before?

10 A Yes.

11 Q And when did you last see it?

12 A Today.

13 Q And did you provide it to counsel?

14 A No.

15 Q How did counsel get it?

16 A I don't know.

17 Q So this is the first time you have seen it
18 in how long?

19 A Probably whenever the Health Department
20 took over the responsibility of the -- through the
21 Physical Education Department took over our part of
22 the health because too much information had to be
23 dispersed in biology because of new technology,
24 research.

25 Q Here's a question, sir. How long ago did

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1 you last see it before you saw it yesterday or
2 today?
3 A I can't recall.
4 Q Was it ten years? 15 years? 25 years?
5 A Probably 20.
6 Q Twenty years. And is it your recollection
7 that this is the same tape that -- or the same -- I
8 guess it's a videotape of a film strip; is that
9 right?
10 A Yes.
11 Q Is it your recollection you are going to
12 tell this jury that this is the same tape that you
13 saw 20 years ago?
14 A No.
15 Q It's not?
16 A No.
17 Q It is not the same tape?
18 A No. It is the same tape except there was
19 no voice for it; it was only wording below it.
20 Q So this is a voice tape that the one you
21 saw 20 years ago had written script below it; is
22 that correct?
23 A Correct.
24 Q And that written script, how does it
25 correspond to the voice-over, do you know?

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1 A Pretty accurate.
2 Q Are you saying that 20 years ago, you
3 remember the written script and are able to compare
4 it with the voice?
5 A No.
6 Q How do you know it's accurate then?
7 A Because it's the same except the script is
8 there, not the voice.
9 Q Is the script there now, sir?
10 A On the film strip.
11 Q The script is still there?
12 A On the film strip, the original that was
13 used.
14 Q Okay. But it's not there now?
15 A No, it's voice.
16 Q All right. So we're going in circles.
17 Let me see if I can sharpen this a little bit.
18 Are you telling this Judge and will
19 tell this jury that the voice you hear corresponds
20 to the script that was on the film strip that you
21 saw for the most previous -- other than yesterday --
22 20 years ago?
23 A As an explanation.
24 Q And you are able -- you remember -- you
25 are going to tell this jury you remember that script

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- 1 well enough to say it corresponds to the voice-over?
2 A No, only that there was a script.
3 Q Only that there was a script. I'm sorry,
4 sir. Okay. Now then so this one has voice, and the
5 other one had script. So this is not the one that
6 Michelle Schwarz saw?
7 A No.
8 Q Do you know how these lawyers got this
9 videotape?
10 A No.
11 Q Did you direct them how to get it?
12 A No.
13 Q Did they ask you about it?
14 A Yes, if I could locate the original.
15 Q Right. When did they ask you about it?
16 A Maybe in January.
17 Q Okay. And you were first contacted about
18 three-and-a-half, four months ago in this case or
19 longer than that?
20 A Around December.
21 Q Around December. And you have never been
22 told that you weren't going to be a witness in this
23 case, have you?
24 A No.
25 Q You have always been told you could plan

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1 on testifying?
2 A Would you rephrase that again?
3 Q Have you always been told you could plan
4 on testifying in this case?
5 A No.
6 Q When were you first told you would be
7 testifying as a witness?
8 A I was not until -- yesterday.
9 Q Well, you made arrangements, sir, to fly
10 out here. When were you told that you would be
11 flying out here to potentially testify in this case?
12 A This past Monday.
13 Q That was the first time you made
14 arrangements?
15 A Yes.
16 Q When did they tell you that they might
17 want you to come out here and testify?
18 A It was Monday.
19 Q And when did they -- well, when they
20 contacted you some three-and-a-half, four months
21 ago -- correct?
22 A Yes.
23 Q What did you think that they were
24 contacting you for?
25 A For information from our records of

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1 teaching to use.

2 Q And did they tell you that you wouldn't be
3 a witness then?

4 A They did not.

5 Q Did they tell you you might be a witness?

6 A No, they did not.

7 MR. DUMAS: Your Honor, excuse me,

8 counsel. Your Honor, this is way beyond.

9 MR. TAUMAN: I'm going to get right to it.

10 Just give me a couple more questions.

11 MR. DUMAS: This is a second deposition.

12 MR. WOBBROCK: When --

13 MR. DUMAS: Let me finish, Mr. Wobbrock.

14 MR. WOBBROCK: I'm sorry. I thought you

15 were done.

16 MR. DUMAS: This does not appear to be
17 properly questions in aid of objection. He's
18 going way far afield. It's now a discovery
19 deposition.

20 Go ahead, Mr. Wobbrock.

21 BY MR. WOBBROCK:

22 Q When did you first mention this videotape
23 or this film strip?

24 A From the beginning, when I was asked if I
25 could recall what materials were used, and I said we

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1 had a list of film strips and that the "Smoke or Not
2 to Smoke" I thought was part of that. So I searched
3 for that film strip list and found it.

4 Q And you gave them the list when?

5 A Uhm, probably the middle of February,
6 through Federal Express.

7 Q All right.

8 MR. DUMAS: May I proceed, Your Honor?

9 MR. WOBBROCK: No, just a second.

10 BY MR. WOBBROCK:

11 Q So middle of February, you gave them a
12 list of the film strip that you think is now going
13 to be shown to the jury?

14 A As far as I can recall. I can't remember
15 the exact date.

16 Q And when did they tell you they found it
17 or one like it?

18 A Found the list or the --

19 Q The tape, the strip? When did they tell
20 you that they found the video -- the film strip or
21 one like it?

22 A Today.

23 Q That's the first time you heard they found
24 it?

25 A Yes.

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1 Q When they flew you out here, they didn't
2 tell you that we're going to ask you about this film
3 strip?

4 MR. DUMAS: , Your Honor, this has nothing
5 to do --

6 MR. WOBBROCK: We're just about there.

7 A Not that I recall.

8 MR. WOBBROCK: Mr. Tauman will take over
9 from here.

10 MR. DUMAS: Wait, there is no more
11 questions. I can lay some additional
12 foundation questions, Your Honor.

13

14 EXAMINATION ON OFFER OF PROOF

15 BY MR. DUMAS:

16 Q Mr. Garrelts, do you remember showing to
17 your high school biology class a film strip produced
18 by the American Cancer Society?

19 A Yes.

20 Q And do you remember, Mr. Garrelts, in 1968
21 compiling a four-page list of the roster of film
22 strips that were in the library at New -- at the
23 Lincoln Way Community High School?

24 A They weren't in the library. They were
25 within our classroom.

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1 Q Great. I'm going to hand you what has
2 been marked Defendant's Exhibit 2450. Is that the
3 list you, yourself, personally prepared in 1968
4 inventorying the lists of films and film strips at
5 the school?

6 A Yes, because I believe in organization.
7 They weren't organized. And they were not numbered.

8 Q So you believe in organization, so you
9 prepared a list in 1968 to organize the film strips?

10 A For the other teachers, too.

11 Q For the use of -- everyone's use and
12 benefit?

13 A All biology teachers.

14 MR. DUMAS: I will over 2450, Your Honor.

15

16 (Whereupon, Exhibit No. 2045 was offered.)

17

18 MR. TAUMAN: What is 2450?

19 MR. DUMAS: What he just testified.

20

21 EXAMINATION IN AID OF OBJECTION

22 BY MR. WOBBROCK:

23 Q Mr. Garrelts, do you know if Michelle
24 Schwartz, Michelle Chuck, ever saw this film strip?

25 A I assume she did if she was in attendance

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1 that day.

2 Q Well, you gave a deposition a couple hours
3 ago, and the same question was asked you. "Do you
4 know that Michelle Schwarz ever saw that film?"
5 Your answer was, "No." Do you recall giving that
6 testimony?

7 A Yes, but I --

8 Q You are just assuming?

9 A I would say assuming she was in attendance
10 that day. I'm not sure she was in attendance that
11 day. Nobody could know that.

12 Q So you don't know if she saw it or not, do
13 you, sir?

14 A It was given to the class. I do not know.

15 Q You didn't qualify by saying she was in
16 attendance or not when you gave the answer. You
17 said you don't know if she saw?

18 A I answered the question to the best of my
19 ability.

20 Q And the film that she actually saw has
21 never been located, has it?

22 A No. The whole list hasn't been found -- I
23 mean, all the film strips. Modern technology has
24 taken over with video cassettes and DVDs.

25 MR. DUMAS: Your Honor, I believe an

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1 adequate foundation has been laid. This
2 witness says that he regularly showed the video
3 in his high school biology classes. He would
4 have shown it in 1962 to 1963 in his biology
5 class.

6 We laid an adequate foundation that
7 Michelle Chuck took this gentleman's biology
8 class in 1962 and 1963. He kept a log prepared
9 six years later of film strips, which this one
10 appears on there. He has testified that he has
11 looked at the video, and to the best of his
12 ability, this is a videotape version of the
13 film strip that he showed.

14 Your Honor, that's a sufficient
15 foundation. The foundational requirements for
16 evidence are not to an absolute scientific
17 100 percent mathematical certainty or you
18 wouldn't get anything in. It's a reasonable
19 basis. I think this fact finder can decide for
20 themselves.

21 Mr. Wobbrock is, among many things, an
22 excellent lawyer, and he can cross-examine this
23 gentleman until the cows come home and bring
24 out all the potential holes and pitfalls about
25 whether he can say for absolute fact Michelle

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1 Chuck was in his class that day or whether she
2 was home sick with a cold, and that's certainly
3 possible. But that goes to the weight of the
4 evidence, Your Honor, not its admissibility.

5 MR. TAUMAN: Your Honor, I have a Motion
6 for the Court that I would prefer to handle in
7 the absence of the witness.

8 THE COURT: All right. We'll have the
9 witness to step out, and you may make your
10 Motion.

11 MR. DUMAS: That means you have to leave.
12 Just weight outside in the hall, sir. Don't
13 run off.

14 Just so the record is clear, Your Honor,
15 I did offer 2450. I'm not sure if the Court
16 ruled.

17 THE COURT: I hadn't ruled.

18 MR. TAUMAN: Let's hold onto this until --

19 THE COURT: I think counsel has something
20 to say about it.

21 Go ahead, counsel.

22 MR. TAUMAN: Your Honor, I have four
23 separate reasons why the videotape, which is
24 labeled -- I've lost the number now -- 1502
25 should not be received by the Court, and I move

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1 that it be excluded.

2 The first reason is a completely
3 inadequate and absent foundation. That
4 involves three separate issues. One is the
5 fact that this witness did not authenticate
6 this particular videotape -- or let's call it a
7 film strip. You understand it's a videotape of
8 the running of a film strip, which he cannot
9 authenticate. He said very candidly, very
10 directly, right on point that this is not the
11 same. This is a different videotape than the
12 one that he showed his class. We'll accept
13 that he has shown this to his class. But this
14 is a different film strip. This is different
15 in the sense that it apparently, according to
16 him -- although who knows how he comes about
17 this -- but it does have the same photographs.
18 I don't know whether you want to show a couple
19 of frames of this. But you know what film
20 strips are. We are probably about the same
21 age.

22 Unfortunately, Mr. Lane had no idea what
23 film strips were.

24 MR. DUMAS: He's not that young.

25 MR. TAUMAN: He claims he is. In fact,

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1 it's a series of images that we see. And as
2 Mr. Garrelts testified, there is no script to
3 it or no text to it.

4 This one, on the other hand, may or may
5 not be the same images. I don't think we even
6 got as far as that testimony. But what he
7 clearly said is that he cannot say that it is
8 the same script, that the script, which is a
9 verbal, audible script with music and some
10 other accoutrements, sound effects, that he
11 could not say that it was the same as the text
12 strip that appeared on the videotape.

13 The second is that he could not say and
14 the only relevance to this -- I am assuming the
15 only relevance to this is what Michelle Chuck
16 knew, as we discussed earlier when we talked
17 about hearsay and notice. The fact is notice
18 to Michelle -- at that time Chuck -- is an
19 issue in this case, what she knew. And he
20 could not testify that she had ever in her
21 lifetime seen this videotape.

22 The third is that, as he said, he didn't
23 even teach all this course. He team taught
24 with someone else. Now, if both people were
25 sitting there, and they both swore one or the

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1 other one showed this videotape in class, that
2 would be a different circumstance. So he can't
3 even testify that he was the one in their
4 team-teaching situation that showed this, if in
5 fact it was shown.

6 The fourth reason actually is a more
7 personal reason with me, and that is this
8 videotape, the videotape of the film strip, was
9 supplied to us on Sunday -- not the Sunday
10 before trial started, not a Sunday in January,
11 not a Sunday in February, but last Sunday, four
12 days ago. There is absolutely no reason -- I
13 know Your Honor has been indulgent at certain
14 times regarding the rules that were set down
15 about the witness list -- or excuse me, about
16 the exhibit list. And in fact, it was
17 plaintiffs who said, "Let's let it all hang
18 out. Let's not have any rules." But defendant
19 said "Oh, no. If it's not on the list, it
20 doesn't come in unless there is good cause
21 shown." And I challenge Mr. Dumas while he's
22 standing there to show this Court any cause,
23 much less good cause.

24 So there are four separate reasons --
25 three based on lack of authentication and one

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1 based on a clear and direct violation of this
2 Court's rules -- that we wish to exclude this
3 videotape and any testimony associated with it.

4 MR. DUMAS: Your Honor, I provided the
5 videotape to plaintiff's counsel within, I
6 think, two days or so of when my office got it.
7 We just got it. I wasn't sitting on it, Judge.
8 If I had gotten it a month ago, I would have
9 given it to them a month ago. Okay. I can
10 represent that to the Court and to counsel.

11 Second of all, I can also represent to
12 counsel that I provided him, whenever exhibits
13 were exchanged, Exhibit 651, which is "To Smoke
14 or Not to Smoke", a pamphlet from the American
15 Cancer Society, which contains verbatim, slide
16 by slide, a complete and total transcript of
17 what we're just going to hear, page for page,
18 counsel, starting on page 10, going to page 20,
19 script. And it goes one, two -- describes the
20 image and has a complete transcript, just like
21 it appeared probably on the bottom of the film
22 strip 35 years ago.

23 Second of all, Your Honor, or third of
24 all, Your Honor, with regard to the foundation,
25 it's ample. It's ample. Counsel knows it.

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1 This jury needs to see it.

2 THE COURT: All right. What I'm concerned
3 about, counsel, if the purpose is to show that
4 Michelle Chuck saw this film and you don't have
5 a witness that can testify that she saw it, how
6 do you get the foundation in that she saw the
7 film? It can be speculated that there is a
8 possibility that she saw it. She could have
9 seen it.

10 MR. DUMAS: Right.

11 THE COURT: It's highly probable that she
12 saw it.

13 MR. DUMAS: Right.

14 THE COURT: But the witness, he can't
15 testify to the fact that she saw this film.
16 That's the weakness in the foundation, is you
17 don't have a witness that can say that she saw
18 it. And if she didn't see it, then what is the
19 relevance of the testimony?

20 MR. DUMAS: There would be two grounds,
21 Your Honor.

22 First of all, I think with regard to
23 foundation, it's exactly the same as Mr.
24 Wobbrock introducing an ad for Merit cigarettes
25 and saying, "Look at this right here. It says

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1 sixty percent less tar, nine milligrams.
2 Michelle Schwartz relied upon that." Well,
3 where is the evidence that Michelle Schwarz
4 read that ad and relied upon it? I mean, it's
5 an assumption. They were out there in the big
6 world, and Michelle Schwarz probably saw a
7 Merit ad. So it comes into evidence. That's
8 the standard that we work with in a real
9 courtroom. Okay.
10 This witness -- and I knew it when I
11 called him -- cannot remember. He doesn't have
12 an attendance chart. He can't put Michelle
13 Schwartz sitting in seat number 12 on the today
14 he showed the video. That's true, Your
15 Honor -- can't do it. And if that's what the
16 Court is going to hold me to, then we might as
17 well send this witness home and I go home, too,
18 because I can't do that.
19 But I don't think this evidentiary
20 standard is that high, Judge. I just don't
21 think it's that high. This is not a criminal
22 case.
23 THE COURT: I understand what you are
24 saying. But what we're looking at, we're
25 looking at something that happened so long ago,

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1 a long time ago with a witness from that era.
2 And luckily, you were able to find this
3 witness. If it was something that happened
4 five years ago and you had a witness that
5 remembered Michelle Chuck -- he doesn't even
6 remember Michelle Chuck. But he doesn't know
7 whether she was in that day or not because he
8 doesn't remember her.

9 But I think the importance of the
10 testimony, of what this film is saying has such
11 gravity that it can't come in, and this Court
12 is not going to allow it to come in unless
13 there is a better foundation than what I heard.

14 MR. DUMAS: With regard to Michelle
15 Schwarz --

16 THE COURT: Because it has great gravity.
17 It has great importance for this case, but the
18 foundation is so nebulous. It's almost like a
19 mist that keeps moving. But I haven't heard
20 anything that's solid to let this information
21 in.

22 MR. DUMAS: The second basis, Your Honor,
23 would be as general evidence of the kind of
24 information that was out there in society at
25 large to prove the common knowledge of high

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1 school students in the '60s regarding the
2 dangers of smoking. We are entitled to put
3 on -- and I believe this witness has amply laid
4 a foundation for that -- that American Cancer
5 Society materials were used in schools
6 generally.

7 Even if Michelle Schwarz wasn't there on
8 October 12th, 1963, because she was home sick
9 that day, all 24 of her friends were there, and
10 her friends were there the freshman year and
11 the junior year and the senior year. That's
12 part of common knowledge, Your Honor, common
13 knowledge at her high school in the '60s.

14 Now, to not allow the evidence in, Your
15 Honor, under either one of those grounds would
16 be really, I believe, inappropriate, Your
17 Honor. It would come in under either grounds.
18 I believe an adequate foundation has been laid,
19 probability that she saw this film, that her
20 class saw this film. But even if I don't quite
21 get there, I got it that it's in her high
22 school, all four years in her high school,
23 shown class after class after class to her
24 colleagues, her friends. There is excellent
25 circumstantial evidence, Your Honor, that the

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1 information in this film was around Michelle
2 Schwarz's environment. That's all I can do.

3 THE COURT: All right. Counsel?

4 MR. TAUMAN: I just have a very brief
5 comment on the last point. I think the first
6 point has been covered.

7 That is the issue of sort of the changing
8 the focus here doesn't solve the original
9 problem, and that is that this videotape is not
10 authenticated. The only thing about it that is
11 authenticated are the visual images of it. And
12 if, in fact, that's what is going to be used
13 for common knowledge, then I'm not sure that
14 this witness is the right witness to use it,
15 but the fact is that this is -- there is no
16 evidence that this was a common -- which is the
17 definition of common knowledge -- as opposed to
18 what Michelle Schwarz -- we understood why they
19 were bringing this witness in and why they were
20 bringing this videotape in, and that is to show
21 what Michelle Schwartz actually knew. Now they
22 can't do it, they want to take this videotape
23 that they have shown in a very narrow
24 circumstance and now promote it as an universal
25 information. And I think that that is just not

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1 the way to prove common knowledge, at least not
2 through this witness.

3 And also the fact is that the videotape,
4 itself, has not been authenticated. And I
5 think that's very clear. At least the verbal
6 script aspects of it have not been
7 authenticated.

8 THE COURT: Very well. The videotape will
9 not be admitted as substantive evidence. If
10 counsel want to admit it as an offer of proof
11 where somebody else can maybe take a look at it
12 at sometime in the future, that's fine. But
13 the Court is not going to admit it.

14 MR. PHILLIPS: I appreciate the Court's
15 ruling. I want to make a record on this.

16 MR. WOBBROCK: Can we ask the jury be sent
17 home, Your Honor, if they haven't been, since
18 it's 5:05?

19 MR. PHILLIPS: Makes sense.

20 May I proceed, Your Honor?

21 THE COURT: Let's wait until she lets the
22 jury go. As soon as she close the door, we'll
23 get going, because we all want to get out of
24 here.

25 Proceed, counsel.

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1 MR. PHILLIPS: Your Honor, I have to take
2 exception to the ruling.

3 THE COURT: That's fine.

4 MR. PHILLIPS: I understand.

5 THE COURT: That's why I said it can be
6 introduced as an offer of proof so that other
7 minds, if possible, and if necessary, at a
8 later date can review it and also make a
9 decision based upon -- you have got all the
10 arguments on the record unless you want to do
11 some additional arguments, which I'll allow you
12 to do.

13 MR. PHILLIPS: I'm going to move to strike
14 the Frank Statement. I'm going to move to
15 strike all the Benson & Hedges ads that have
16 been shown from 1960 to 1964. I'm going to
17 move to strike every advertisement before 1964
18 because there is no a scintilla of proof in
19 this case Your Honor, that Michelle Schwarz saw
20 any of those things, none of them.

21 We at least got the high school teacher.
22 We have got the context. We got the classroom,
23 and Your Honor is concluding that can't come in
24 with respect to the information environment
25 around Michelle Schwarz. And I just have to

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1 submit to Your Honor that's unfair. That's a
2 double standard for the parties in terms of
3 what evidence will come in with respect to
4 information that was available to Michelle
5 Schwarz.

6 Dr. Pollay didn't testify that Michelle
7 Schwarz saw a single one of the Benson & Hedges
8 ads that he said that influenced and created
9 friendly familiarity. Absolutely no evidence
10 at all of that, Your Honor. There hasn't been
11 any evidence in this case regarding the Frank
12 Statement being seen or heard by Michelle
13 Schwarz yet the plaintiffs claim that she
14 relied on it. Now, how can you allow that
15 evidence to remain in the case and not let this
16 evidence proceed? Frankly, I think it's
17 incredibly unfair.

18 THE COURT: Actually, there is no question
19 that the Frank Statement before this Court was
20 a statement when the Frank Statement was made.
21 There is no question that what the jury heard
22 about the Frank Statement is a statement that
23 was made at the time. I'm not convinced that
24 this videotape is the videotape that Michelle
25 Schwarz saw. There is a difference in that

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1 situation.

2 MR. PHILLIPS: No, there is no difference,
3 Your Honor, because what you just said is you
4 are not convinced this is a videotape that
5 Michelle Schwarz saw.

6 THE COURT: That's right.

7 MR. PHILLIPS: There is no evidence that
8 Michelle Schwarz saw or heard the Frank
9 Statement, either. There is no question --

10 THE COURT: But there is no question that
11 the Frank Statement is a authentic statement
12 that was made and existed, and it hasn't been
13 changed over the years and is the same thing.

14 The videotape that is attempted to be
15 shown, the Court is not convinced that that
16 is -- from what the witness has testified, the
17 Court is not convinced that his testimony is
18 clear enough to allow the Court to accept it.
19 That's what I'm saying. If somebody got up and
20 said, "Here's the Frank Statement. I think
21 that's a statement that was rewritten in 1980
22 or something, but I'm not sure that that's the
23 same statement that was made." In that
24 situation, the Court would not have let the
25 Frank Statement in. If the Frank Statement had

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1 to come in on this witness' testimony, the same
2 testimony he gave to the videotape, the Frank
3 Statement wouldn't be in.

4 MR. PHILLIPS: Your Honor, the witness
5 testified that the video, the visual portion of
6 it, is exactly the same. The only distinction
7 was an audio tape versus the script tape. At
8 minimum under those circumstances, there is an
9 authentication for purposes of the video being
10 shown to the jury, and then the written script
11 can be authenticated separately.

12 The point here is that you started this
13 analysis by saying you just don't have a
14 foundation because you can't say that Michelle
15 Schwarz saw it. I have to call the Court's
16 attention that I think you are applying a
17 completely double standard to the parties,
18 completely. The Benson & Hedges ads, the Frank
19 Statement, there is no evidence that she ever
20 saw that. And yet you let those in as quickly
21 as possible. There is absolutely nothing in
22 the record showing that she saw those things or
23 she relied upon them, and yet the jury has the
24 impression that she did because all that
25 evidence is in right now.

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1 Now, for us to be able to defend ourselves
2 in this case, Your Honor, you need to be able
3 to let us put in the evidence about the
4 information that was -- environment that was
5 around her. We have gotten a lot closer, a lot
6 closer to the possibility that Michelle Schwarz
7 saw that video than they have gotten with any
8 of their evidence. We have gotten a lot
9 closer. And that's evidence that should be
10 used for purposes of showing what the
11 information environment, what the general
12 notice to her classmates and others were.

13 This witness can say quite clearly and
14 counsel can ask him that there is no -- "I
15 don't know whether she actually saw it. She
16 may not have been in attendance that way. I
17 know I showed it that year." That's what he
18 said, but to be able to let the jury evaluate
19 the real information environment rather than
20 excluding it on a ground that is not a valid
21 ground and which demonstrates a different
22 standard for the plaintiff and the defendant in
23 this case, Your Honor. So I really intreat you
24 to reconsider your ruling.

25 THE COURT: All right. Counsel.

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1 MR. TAUMAN: We don't have motions for
2 reconsideration.

3 I wish personally to disassociate myself
4 from Mr. Phillips remarks about a double
5 standard, and I would hope Mr. Dumas, while
6 he's standing there, would do the same.

7 MR. DUMAS: Disassociate what?

8 MR. TAUMAN: Yourself from Mr. Phillips'
9 accusations that there is a double standard in
10 this courtroom. I guess not.

11 I would like to say this that in terms of
12 Mr. Phillips' Motion to Strike, such as is his
13 Motion, the fact is that all of the information
14 and all of the documents that Mr. Phillips had
15 reference to were document in the mass media
16 that we know were broadcast and published.
17 They weren't necessarily offered exclusively
18 for the fact that Michelle Schwarz actually saw
19 them. They were broadcast in the mass media.
20 The Frank Statement, Philip Morris is very
21 proud of the fact that they published that in
22 400 newspapers across the country.

23 The advertisements, they got those
24 advertisements on the TV and into the magazines
25 as much as they could possibly afford. These

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1 were issues of the mass media that helped to
2 inform the public, and we have not objected to
3 their documentation of common knowledge -- we
4 haven't heard their common knowledge witness
5 yet -- about things that were in the mass media
6 or things that they could prove that Michelle
7 Schwarz saw one way or the other.

8 So there is no double standard in this
9 courtroom. We have proved our case on the
10 issues that are relevant to this Court, and
11 I'm -- I just -- I guess I'm just personally
12 offended at that accusation.

13 MR. WOBBROCK: I would like to join with
14 that, Your Honor.

15 MR. PHILLIPS: Well, I didn't mean to
16 offend plaintiffs, Your Honor, I really have to
17 tell you I feel there is a double standard here
18 on this issue. I wouldn't have said it unless
19 I meant it. I really believe Your Honor is not
20 giving us a chance to present our defense by
21 making that ruling. I have to say that, I'm
22 sorry.

23 THE COURT: I will allow your statement to
24 stand. The Court is not going to reconsider
25 its ruling. The Court is not going to change

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1 its ruling. The ruling stand. And maybe ten
2 years down the road from now, we'll determine
3 who deserves an apology.

4 Thank you. Court is out of session. See
5 you nine o'clock in the morning.

6 MR. DUMAS: Your Honor, excuse me, no
7 further argument, Your Honor. I want to make
8 an offer of proof.

9 For purposes of offer of proof on
10 Mr. Garrelts' testimony, I would offer as Court
11 Exhibits, Defendant's 1502, 651, which is "To
12 Smoke or Not Smoke," a transcript; 2450, the
13 biology film strip list prepared by
14 Mr. Garrelts, and if it's necessary, Defense
15 Exhibit 700, which I know is already in
16 evidence. I would offer into evidence
17 Defendant's Exhibit 652, the Modern Biology
18 textbook in evidence.

19
20 (Whereupon, Exhibit Nos. 700 & 651 were offered.)

21
22 MR. WOBBROCK: The offer of proof is other
23 than 652.

24
25 (Whereupon, Exhibit No, 652 was offered.)

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1
2 MR. DUMAS: Correct. The offer of proof
3 is on the previous exhibits. These I offered
4 into evidence, defenders Exhibits 700 and 652.
5 MR. WOBBROCK: Can you and I talk about
6 652. Do you have the whole textbook?
7 MR. DUMAS: Do we have the whole textbook?
8 I don't know the answer.
9 MR. WOBBROCK: I would like to look at
10 that before I agree one way or the other.
11 MR. DUMAS: I don't know that I do, but if
12 I do, I will show it to you.
13 THE COURT: All right. We will hold up on
14 652.
15 The information in the offer of proof will
16 be accepted. The counsel have the right to
17 present an offer of proof.
18 MR. DUMAS: I think I would also, Your
19 Honor, just for my record, indicate that
20 obviously Mr. Garrelts' testimony would be part
21 of the offer of proof, and I think just for
22 safety considerations, I am going to obtain a
23 copy of his deposition and mark that as an
24 additional Court Exhibit for purposes of the
25 offer of proof. Thank you.

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1 THE COURT: Have well. Now, where are we
2 right now?

3 MR. DUMAS: Dr. Carchman will be back on
4 the stand at nine o'clock.

5 THE COURT: All right. nine o'clock in
6 the morning.

7 MR. DUMAS: Thanks.

8 MR. TAUMAN: Thank you, Your Honor.

9

10 (Whereupon, court adjourned at 5:15 p.m.)

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1 STATE OF OREGON)
2) ss.
3 County of Multnomah)
4

5 I, Estelle T. Keating, Official Court
6 Reporter of the Circuit Court of the State of
7 Oregon, Eleventh Judicial District, certify that I
8 reported in stenotype the foregoing proceedings in
9 the above-entitled case.

10 I further certify that my stenotype
11 notes were reduced to transcript form by
12 Computer-Aided Transcription under my direction.

13 And I further certify that pages 1
14 through 83 contain a full, true, and accurate record
15 of my stenotype notes.

16 Dated this 6th day of March, 2001, at
17 Portland, Oregon.

18
19
20
21 _____
22 Estelle T. Keating
23
24
25

